

1937

Compulsory Aviation - Liability Insurance in Great Britain and the United States

Arnold W. Knauth

Recommended Citation

Arnold W. Knauth, *Compulsory Aviation - Liability Insurance in Great Britain and the United States*, 8 J. AIR L. & COM. 461 (1937)

<https://scholar.smu.edu/jalc/vol8/iss3/10>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

COMPULSORY AVIATION-LIABILITY INSURANCE IN GREAT BRITAIN AND THE UNITED STATES*

ARNOLD W. KNAUTH‡

Great Britain

Passengers and Goods

The situation of British air carriers and aircraft owners is largely governed by the Air Navigation Act of 1920-1936 and the Carriage of Goods by Air Act of 1932, which is the Warsaw Convention.¹ The key to the situation in England is found in the fact that is no general public policy against a carrier and his customer contracting as they please out of any and all negligence. As far as the judges are concerned, all they require is that the contract of exemption should be clear and unequivocal. The judicial attitude has been broadly altered in three directions by statute—by the Railway Act of 1854 as to transport of goods by rail, by the Merchant Shipping Acts as to carriage of emigrants, and by the Carriage of Goods by Sea Act, 1924.

The result of the Railway Act is briefly that there are two rate structures—one a low rate at Owner's Risk; the other a high rate, at Carrier's Risk. "So long as the option is a bona fide option, then the lower-rate contract may provide immunity for all neglect or default."²

The Carriage of Goods by Sea Act standardizes the negligence clause and other clauses regardless of any option as to rates. The emigrant law, to protect the masses who emigrated in the last century, is now a dead letter. But it is worth noting that the cabin passenger was and is left free to contract away his common law right to hold his carrier liable for breach of contract or negligence. English carriers of all sorts avail themselves of this freedom; hence there are very few personal injury and death cases in the law books.³

* This article formed a portion, now revised, of an article appearing in the 7 *Air Law Review* 259 (1936).

‡ Editor of U. S. Aviation Reports; U. S. Delegate to the 1936 C.I.T.E.J.A. meeting; Secretary of the Maritime Law Association, Lecturer in New York University on Air Law and Admiralty.

1. See *Wingfield & Sparkes* (1928) and *McNair* (1932). The extensive amendments of 1932 and 1936 have so altered the English statutes that these volumes can no longer be relied upon.

2. *Leslie*, *Law of (English) Transport by Railway* (2d ed.) 165 (1928).

3. In the Titanic cases, *Ryan v. Oceanic S. N. Co., Ltd.* [1914] 3 K. B. 731.

Until very recently, English air carriers have enjoyed similar immunity from all suit by reason of contracts of immunity which the courts would have upheld. That is the state of domestic aviation in England today, for while the King in Council has had the authority since 1933 to apply the Warsaw Convention (for passengers and goods) as the local law of air carriage, this has not been done. The only change has been in foreign flights, to which the Warsaw Convention was applied in 1933.

Surface Damage. No British surface damage law was litigated before 1920 in respect of an airplane accident, so far as I am aware: but Coke's famous maxim "*cujus est solum*" and Lord Ellenborough's famous remark in *Pickering v. Rudd*⁴ in 1815 have been the subjects of endless debates. The whole matter became academic in view of Section 9 of the Air Navigation Act of 1920, which has just been extensively amended and extended by the Act of 1936. The phraseology is peculiar, and worth reading:

"Sec. 9 (1). No action shall lie in respect of trespass or in respect of nuisance by reason only of flight of aircraft over any property at a height above the ground which * * * is reasonable, so long as the provisions of this Act and regulations made thereunder are duly complied with"

—which reminds one of the conditional phraseology of our Harter Act⁵ that the shipowner shall not be liable for errors of navigation if he uses due diligence to make his vessel *in all respects* seaworthy—in other words, the thought is that unless compliance with the Act and any Order under the Act is *literally complete*, the aviator shall be liable for trespass and nuisance as at common law.

The Act continues:

"but where material damage is caused by aircraft in flight, taking off or landing * * * or by any article or person falling from aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft * * * without proof of negligence or intention * * * as though the same had been caused by his wilful act, neglect or default, except where the damage * * * was caused by or contributed to by the negligence of the person by whom the same was suffered."

This regulates the Common Law remedy; hence there is no

12 Aspinall Mar. Cas. 466 (K. B. and C. A.) four emigrant passengers tested their rights: they recovered £100 each and no further suits were tried. There was a general settlement.

4. *Pickering v. Rudd*, 4 Camp. 219 (Nisi Prius 1815). Lord Ellenborough said: "Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quære clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage." Cf. *Hotchkiss, On Aviation Law* (1928) §17a.

5. The Harter Act, February 13, 1893, 46 U. S. Code 190-196, as construed in the case of *May v. Hamburg* (the Isis), 290 U. S. 333, 54 Sup. Ct. 162 (1933) reargument denied. Cf. *McNair, The (English) Law of the Air* (1932) p. 78.

option to abandon the statutory remedy and sue at law. Kaftal suggests⁶ that this way of putting it, in contrast to Section 5 of our Uniform Act of 1922, leaves the aircraft owner free to argue common law points, such as the last clear chance, for under the English Act one argues about a modified form of the theory of negligence and not a statutory fiat of absolute liability of "insurance" unknown to the common law.

Both before and after 1920, the unlucky English owner of a fallen aircraft might always reduce or defeat recovery by the machinery of insolvency or bankruptcy.

But the Act of 1936 is aimed to limit that possibility of escape. The new Act⁷ provides, in Part III, sections 15-22, and Schedules II and III, a system of limited liability coupled with compulsory deposits of cash or surety bonds or liability insurance. Hereafter no one shall fly civilly in Great Britain, on pain of a fine of £200 and jail for six months, unless he deposits with the Clerk of the High Court a sum between £10,000 for a small airplane and £50,000 for two or more large airplanes—the precise figure being determined by a formula of £1 Sterling for each pound avoirdupois of the loaded aircraft—or furnishes a similar substantial surety or provides an equivalent insurance against which injured parties may have direct recourse under the Third Parties (Rights Against Insurers) Act of 1930, which, like Section 109 of the New York Insurance Law, prevents certain classes of liability underwriters from relieving themselves of their contracts because of the failure of their assureds to pay damages by reason of bankruptcy. This novel Act will bear down heavily on the thousand or fifteen hundred individual owners of private English aircraft. Even assuming that their ships are small, nevertheless £10,000 times say 1,000 aircraft means that some £10,000,000 might be permanently tied up as a pledge to the general public that crash damage will be paid for. Obviously individual owners may thereby be driven to form large groups so as to enjoy the benefit of the system by which owner of more than two aircraft need furnish security for no more than two.⁸

This new English Act is the first practical step towards putting into effect something like the plan of the Rome Convention of 1933. Parliament has set out rather elaborate provisions intended to make

6. *Kaftal*, 5 JOURNAL OF AIR LAW 179 (1934); 5 Air Law Review 157 (1934).

7. 26 Geo. 5 & 1 Edw. 8, c. 44.

8. The Irish Free State has, at the same moment, enacted an Air Navigation Act closely resembling the new English Act, No. 40 of 1936.

it possible to work out the desired security through the mechanism of the insurance market. There were extensive hearings, and it is evidently thought that aircraft-owners will usually be able to satisfy the new Act by means of insurance policies on a premium basis. The necessary insurance capital for writing this business is related to that required for the operation of the Motor Insurance Act of 1930, as amended in 1934; the necessary surety capital is set out at £15,000. (Sec. 18.) It seems that underwriters may not have to segregate as much capital to write this business as the aircraft owners would have to do if they should elect to pledge their own capital, either as individuals or in fleets. If the premium basis does not prove attractive, the aviator has the double chance of escape through the surety bond or the cash deposit. The owners of large fleets—in England at present that means Imperial Airways, Air France and K. L. M.—come off relatively cheaply, as the diminished security required for large fleets favors the large owner.

Whether the new English example should be taken by us as a guide for legislation in America will be discussed in a moment. It has not yet been followed by Canada, whose Air Navigation Law resembles the English Act of 1920.

United States

The forty-eight States, the District, the Territories and Possessions of the United States exhibit almosts every imaginable theory. We find several instances where one theory has frankly been abandoned for another even during the two short decades of active aviation. It is indeed curious to find legislators so ready to jump right and left when the amount of aviation loss and damage litigation has been so small, and the hammering of ideas and facts on the anvil of the common law so scanty.

Thus Connecticut⁹ and Idaho¹⁰ declared for and later against "absolute" liability. Pennsylvania¹¹ recast her highly elaborated statutory system. California¹² passed a double faced statute, on the chance that the first aspect might be unconstitutional, whereupon the second should come into force. The *Stoll* case in New York,¹³ among others, said that the rule of *res ipsa* could be applied to

9. Conn. Pub. Acts, 1929, c. 253; 1929 U. S. Av. R. 451, §32.

10. Idaho L., 1931, c. 41, c. 100; 1931 U. S. Av. R. 335, §5.

11. Pa. L., 1929, Act 316; 1929 U. S. Av. R. 753; L., 1933, Act 224; 1933 U. S. Av. R. 476.

12. Cal. Stats., 1929, c. 850; 1929 U. S. Av. R. 418, at 421, §11.

13. *Carl C. Stoll, Sr. v. Curtiss Flying Service*, 236 App. Div. 664, 257 N. Y. Supp. 1010 (1932); 1932 U. S. Av. R. 163.

aircraft accidents. The *Wilson* case in Massachusetts¹⁴ said that aviation was too novel to justify the application of the rule of *res ipsa*. Some think aircraft are like wild beasts or dangerous instrumentalities, to be owned and used at one's peril.¹⁵ Others apply the rules of ordinary negligence, as to motor cars.¹⁶ *Rochester v. Dunlop* in the New York inferior courts¹⁷ cheered the common lawyers by applying the rules of trespass to an aviator who fell most unwillingly on a high tension power pole. The more recent *Hinman* decision of the Ninth Circuit Court of Appeals¹⁸ cheers the aviators with the suggestion that they may fly wherever there is air, somewhat as watercraft may sail wherever there is water.

One rule seems to be well fixed throughout the United States—namely—that public policy prohibits any common carrier from contracting with his customer that he shall never be liable in any event. This is of course broadly the reverse of the attitude of the English judges, who uphold contracts to carry "at owner's risk," if there is a reasonable option of terms at carrier's risk.

While liability for goods may, in America, be limited to a fair figure by agreement,¹⁹ the trend seems opposed to agreements with passengers as to the recovery for bodily injuries or death.²⁰ After several ocean steamship carriers had begun the use of passenger ticket clauses limiting recoveries to \$2,500 with options of higher limits at increased rates, Congress, on June 5, 1936, passed an act expressly declaring such clauses against public policy, null and void, in contracts for carriage of persons by sea.²¹ Several states specifically forbid common carriers from entering into such agreements. The situation is fairly bewildering, and the student's approach is rendered more diffident as he appreciates the truth of

14. *Wilson v. Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N. E. 212 (1932); 1932 U. S. Av. R. 139.

15. *People v. Crossan*, 87 Cal. App. 5, 261 Pac. 531 (1927); 1928 U. S. Av. R. 79.

16. *Seaman v. Curtiss Flying Service, Inc.*, 1929 U. S. Av. R. 48; revd. 231 N. Y. A. D. 867; retried with the same result 1931 U. S. Av. R. 229.

17. *Rochester Gas & Electric Corp. v. Dunlop*, 148 N. Y. Misc. 849, 266 N. Y. Supp. 469 (1933); 1933 U. S. Av. R. 511.

18. *Hinman v. Pacific Air Transport*, 84 F. (2d) 755 (C. C. A. 9th) (1936); 1936 U. S. Av. R. 1.

19. *Hart v. Penn R. R.*, 112 U. S. 331, 5 Sup. Ct. 151 (1884); cf. the Carriage of Goods by Sea Act, 1936, §4(5), fixing the specific value at \$500 per package or freight unit.

20. Legislatures have, by means of workmen's compensation laws, limited in various ways the right of injured parties to recover unlimited jury verdicts for negligent industrial deaths and injuries. Furthermore, many state fatal accidents acts limit the recovery for wrongful death. Congress declines to permit anyone to sue for wrongful deaths caused by various federal agencies, such as mail trucks and military aircraft, except as a matter of grace by special legislation for each case. The Act of February 13, 1936, 31 U. S. C. 224-1, expresses the Congressional opinion that the life of an alien in a country occupied by U. S. Forces is not to be regarded as worth more than \$1,500. The vagaries and contradictions of the remedy for wrongful death in the United States—federal and state—would be absurd if they were not so painful.

21. Act of June 5, 1936.

Professor Leon Green's statement that "the undertaking to restate the rules and principles developed by the English and American courts finds in the field of torts a most hopeless task."²²

As to damage to goods, we can say broadly that throughout the United States it is generally true that air carriers who are common carriers are liable without statutory limit, but that reasonable limits per package may be had by suitable contract, and that short notice and suit clauses are valid. Some states have special rules of their own.

As to bodily injury to passengers, we can again say broadly that throughout the United States it is generally true that air carriers who are common carriers are liable without statutory limit, and that special contracts limiting the amount an injured passenger may recover are contrary to the prevailing view of public policy, and are null and void. Private carriage is possible—and "guest" laws are possible.²³

But as to death claims of passengers, we must subdivide the States into at least five groups. Every State has some sort of Lord Campbell's Act—what the English more correctly call the Fatal Accidents Act. One group—19 States, District and Territories²⁴—fix a top limit for such recoveries, from \$5,000 to \$12,500 per case. A second group—29 States²⁵—have no top limit. A third group—21 States²⁶ have enacted the Uniform Act of 1922, establishing the rule of ordinary tort liability, which may or may not have a top limit. A fourth group—sixteen States,²⁷ including the important State of California, forbid common carriers from enjoying the benefits of top limits. Eight States,²⁸ including the important states of New York, Pennsylvania, Ohio, Kentucky, Arkansas and Okla-

22. 28 Col. L. Rev. 1014 (1928).

23. "Guest" laws are found in Cal., Ga., Mich., Ohio, S. C., and Texas. The ordinary "guest" law provides that a guest passenger in an automobile may not recover damages because of the negligence of his host. A common-law cause of action seems thus to have been destroyed, without creating any effective substitute remedy.

24. \$12,500—Wis.

\$10,000—Alaska, Canal Zone, Conn., D. C., Ill., Ind., Kan., Me., Mass., Mo., N. H., Ore., S. S. D., Va., W. Va.

\$7,500—Minn., N. M.

\$5,000—Colo.

Cf. Rittenberg, "Limitation of Air Line Passenger Liability," 6 J. Air L. 365, 392 *et seq.* (1935).

25. *No limit on possible recovery:* Ariz., Ark., Cal., Del., Fla., Ga., Idaho, Iowa, Ky., La., Md., Mich., Miss., Mont., Neb., Nev., N. J., N. Y., N. C., N. D., Ohio, Okla., Pa., Tenn., Tex., Utah, Vt., Wash., Wyo.

26. *The Uniform Act of 1922 is at present enacted in:* Ariz., Del., Hawaii, Idaho, Ind., Md., Mich., Minn., Mo., Mont., Nev., N. J., N. C., N. D., R. I., S. C., S. D., Tenn., Utah, Vt., Wis. *Repealed in* Penn. and Idaho.

27. *Special Statutes as to negligence of common carriers are found in:* Ark. (railroads only), Cal., Ill., Ind., Iowa (railroads only), Kan., Ky., La. (requiring air carriers to file a bond), Md., Mass. (punitive fine), Mich. (railroads only), Minn., Miss., N. D., Okla., S. D.

28. *Constitutions prohibiting legislation limiting the amount recoverable:* Ariz., Art. II, §31; Ark., Art. V, §32; Ky., §§54, 196; N. Y., Art. I, §18; Ohio, Art. I, §19a; Pa., Art. 3, §21; Wyo., Art. 10, §4; Utah, Art. XVI, §5.

homa, have embedded in their constitutions clauses prohibiting their legislatures from limiting the amount that may be recovered in a fatal accident case. Finally, the federal government has its Death on the High Seas statute,²⁹ with no top limit but no jury trial, the action being in the Admiralty Court; and its Warsaw Convention³⁰ granting the right to recover not exceeding \$8,300 if the passenger is travelling on a contract for a foreign flight to which the Convention applies. It may be suggested that federal control of interstate commerce could justify a fatal accidents statute for passengers and employees in that field; but whether a federal statute could regulate the recovery for fatal accidents to third persons on the earth's surface caused by aircraft engaged in interstate commerce is much more doubtful. It should also be observed that the airmen themselves are protected by one workmen's compensation law or another.

With such a mixed picture, and with the rigidities of the state and federal constitutional systems of division of powers, it takes real hardihood to plan a campaign to bring about uniformity. As long as people ride in buggies, or in stop-and-go motor cars within fifty miles of their homes, it is simply not worth the effort to harmonize the fatal accidents statutes of distant, or even of neighboring states. But for air transport, this is a real goal to be sought and achieved. Both the air carrier and the passenger should have greater certainty and uniformity than now exists.

EFFORTS AT UNIFORMITY IN THE UNITED STATES

Beginning in 1920 or 1921, efforts were made to bring some of these divergent views into some sort of harmony by means of draft uniform laws recommended by the Aeronautical Law Committees of the American Bar Association and the Commissioners on Uniform Laws.

And now in 1937 the Commissioners on Uniform State Laws with the Air Law Institute and the American Bar Association, through a joint committee, have some new texts. It is proposed to condition the right to fly, and also the right to carry goods and passengers by air, upon the furnishing of compulsory insurance coverages intended, not for the indemnification of the carrier who may have been required by the court to pay damages, but for the direct benefit of parties who suffer loss or damage.

29. 41 Stat. 537 (1920), 46 U. S. C. 762.

30. See 7 Air Law Review 270, note 21 (1936).

POSSIBILITIES OF INSURANCE

"Insurance" is a broad word. It may mean a simple guaranty of a fairly predictable situation; in that sense title to real estate is said to be insured. It may mean something very like a bet—that the next child will be twins, or that it will not rain during the World Series. It may contemplate the statistical pooling of immense numbers of similar valued risks, as in fire, marine and life insurances, such that premiums, losses, reserves and financial policies can be calculated to a hair. Again it may contemplate unvalued and indefinite risks, such as the risk of jury verdicts in negligence cases. High courts of great authority have split on the meaning of the word "insurance" as applied to the obligation of an "insured bill of lading" or of "carriage at rates including insurance."³¹

The suggestions made to the Commissioners on Uniform State Laws, resembling the Rome Convention and the new British and Irish Acts, contemplate the kind of "insurance" that is evidenced by a policy and a certificate of a casualty or liability insurance company. That kind of insurance derives its vitality from spread of risk, statistical averages, and profit to the underwriter. A legal paper is not the place to discuss the statistics of insurance, but no argument is needed to demonstrate the extreme difference between crash insurance covering some nine thousand civil aircraft owned by some seven thousand prospective parties defendant, and crash insurance for some eight million motor cars, or fire insurance for some fifty million buildings. It is idle to seek to draw analogies between such widely divergent statistical situations. It must be obvious that the legal expert who proposes a statute compelling a small industry to make contracts with underwriters for the coverage of a novel risk of highly uncertain character, with insufficient statistics as to the past and a wholly problematical future, assumes a moral risk as serious and uncertain as that concerning which he would legislate. In the light of our present knowledge, a compulsory aviation insurance statute will be quite sure to do either one of two things—enrich the underwriter with unconscionable profits or ruin him with losses. A compulsory insurance law can only be securely based upon a thorough advance canvass of the probable insurance market, and the assurances of reliable underwriters that the suggested risks can be successfully underwritten over a long term of years at rates that can be supported.

31. *The Grecian*, 78 F. (2d) 657 (C. C. A. 2d, 1935), *aff'd* 85 F. (2d) 102 (C. C. A. 2d, 1936) cert. denied, Nov. 16, 1936; *Dixon-King*, 1936 Am. Mar. Cas. 891 (C. C. A. 6th), reversed — U. S. —, 1937 Am. Mar. Cas. 697 (U. S. Supreme Ct., June 1, 1937).

It may be noticed that the pressure for compulsory insurance comes largely from countries where certain general types of insurance have become a semi-state function, as in the Scandinavias and Switzerland, and where the amount of private civil aviation is relatively so unimportant that the general fund can absorb the risk without particularly noticing its extra-hazardous or at least statistically uncertain character. But in the United States, where state insurance funds are not well developed, and where the risks will be written, if at all, in the free insurance markets, the placing of a special risk of unknown hazard, presents a wholly different problem, requiring particular analysis. It is axiomatic that a law intended to regulate a business must be based on careful analysis if the law is to work in practice. Let us then endeavor to appraise the crash risk of aircraft in operation as best we may on the admittedly slim and rapidly shifting fund of information available.³²

Apart from Army and Navy aircraft, we have in the entire world about 13,000 civil aircraft, plus that part of Russia's air force which is not military. Of these 13,000, some 9,000 or nearly three-quarters are in the United States. Unless and until the proportions alter, the United States has the predominant interest in how the private or civil law of the world shall be shaped.

These 13,000 aircraft may be considered in groups. First the great airlines. In the United States we have twenty air-mail contractors, several of them huge concerns, and all of substantial importance. And we have about 125 flying services not engaged in air-mail work. Altogether we have in fleets about 1,000 aircraft in public and charter services, of which about 500 are said to be "airliners."

No other country exhibits a comparable picture. In most countries we find the fleets are combined together into one public airline; in a few, there have been three. The leading names are well known—in Germany, *Lufthansa*; in France, *Air-France*; in England, *Imperial*; in Holland, *KLM*; in Switzerland, *Swiss-Air*; in Belgium, *Sabena*; in Czechoslovakia, *Statni* and the *Skoda* service. All their aircraft taken together hardly equal one thousand.

Next the schools. We have at present twenty-five federally licensed schools, owning some 100 aircraft. There are not many civil schools of aviation in the world, outside of the military schools. Private lessons can be had in France, England, Belgium, Holland,

32. Some drafts of proposed laws would impose the same absolute liability on an aircraft being trundled from one hangar to another as on one in flight. Of course, aircraft on the ground present no greater hazard than motor trucks and busses, etc. The air risk is the sole cause of concern.

Switzerland, and Sweden. But in the other countries where opportunities to learn exist, learning to fly is associated with military or political activities.

Third: governments own substantial numbers of commercial aircraft. Our Department of Commerce owns some 63. In Bulgaria, the state owns 50 or so.

Fourth: manufacturers of aircraft own a substantial number, which are on exhibition, or on sale, or conditionally sold. An examination of recent registration lists indicates that these number about 100 in the U. S. The number in foreign lands is probably less than that.

Fifth: some industries own aircraft for industrial transportation purposes. This accounts for another 100.

Sixth and last, we have the singletons—one or two aircraft owned by individuals, "clubs," taxi services. Here the United States far outstrips the world, let alone any one country. We have some 8,000 aircraft in civilian ownership, outside of fleets. France has 1,500; England probably 1,000 (the figures seem to be guarded); Germany about 1,000; Italy (three years ago) had 44; Japan had 4, owned by two newspapers; Czechoslovakia, Australia, Holland, Belgium, New Zealand, Spain, and Switzerland have between 100 and 200 each. Many countries have only a handful; many have literally none in civilian ownership. The distribution of civilian aircraft over the globe is most uneven.

The rules and laws of other countries, and their arrangements as to aircraft insurances must, therefore, be examined with the greatest caution before we in the United States can accept their conclusions as to the best course for us to follow.

Analyzing our own picture, we had, in January, 1936, 9,072 licensed and identified civil aircraft. There were some 200 "fleets," ranging from 5 to 90 aircraft in each fleet; aggregating some 1,500 aircraft—the biggest, fastest and busiest aircraft of all, up in the air every day and all day. They were piloted by some 2,000 of the 8,000 transport and limited transport pilots. This left us with about 7,500 aircraft owned by some 7,000 individuals and small companies. These were piloted by 746 amateur pilots and 5,961 private pilots and by as many of the transport pilots as were not employed on the fleets.³³

Accident statistics distinguish more and more sharply between the scheduled transports operated exclusively by the transport pilots,

33. The 20 air-mail contractors employed about 700 pilots in 1935.

and the non-scheduled flyers. We must consider separately the scheduled and unscheduled operations. They are perhaps going to be as distinctively different as railroad trains and miscellaneous automobiling, which stand today startlingly contrasted.

It thus appears that the greater part of the working risk may be "loaded" onto about 1,500 aircraft operated in fleets by about 3,000 or 4,000 of the best aviators, operating on schedules and presenting an increasingly remarkable safety record. The balance of the risk would be "loaded" on some 7,500 aircraft operated without schedules and presenting a less encouraging safety record. The question at once arises whether these two groups should be "loaded" alike, or whether there is reason for a basic distinction?

A basic policy must be sought and frankly accepted. If we believe that the risks are sufficiently known, the social and business problem is where to place them. If the "load" is all converged on the aviator, the cost of flying may be boosted until aviation becomes the sport of the rich and the situation may become such that it will be economically imperative for all those who fly to keep themselves on the verge of insolvency so as to reduce the chance of a disaster to their capital.³⁴ Such a solution would not be creditable.

It is submitted that the risk of *property* loss can, in any event, readily be spread over the great mass of fire and other property insurances now in existence with scarcely any appreciable effect on premiums. It is suggested that a campaign to include air crash risks as part of the standard fire insurance coverage would very likely produce broader results in sound and cheap insurance than any available arrangement for converging these risks on the aviators.

Life claims may have to stand on a different footing. It is obvious that most of the population is not insured against accident; and hence the risk of death and injury to third parties on the surface cannot, as a practical proposition, be broadly tacked onto existing personal accident policies. Life insurance is widespread,³⁵ and may be suitable for the purpose, although it does not always cover

34. Cf. *Jackman v. Hauffman*, 159 Misc. 182, 287 N. Y. Supp. 177 (1936). Thus maritime pilots, whose errors may cause great property losses, habitually keep themselves in a financial condition such that there is nothing to be gained by suing them. Owners of tugboats are impelled to a similar course, unless they chance to operate in a jurisdiction where contracts of exoneration made by general notices or letterhead endorsements are recognized as valid. *The Brenta II—Robins D. D. Co. v. Navigazione Libera Triestina*, 261 N. Y. 455, 185 N. E. 698 (1933).

The Black Senatorial Committee's survey of the American shipping industry in 1935 vividly suggested that the striking shortage of accessible invested capital in shipping enterprises was due at least in large part to reluctance to exposing more than the bare minimum capital to the hazards of legal liability. *Senate Investigation of Ocean Mail Contracts*, 74th Congress, 1st Sess.

35. While there are said to be 65,000,000 policies outstanding, it is well known that many policy holders own more than one contract. Just how many individuals are insured seem uncertain; comparatively few women own policies.

injury. Unless a satisfactory vehicle for spreading the risk widely and cheaply can be found, the aviator would seem bound to accept the "load" of the death and personal injury risk. This presents a serious problem, concerning which testimony of aviators and underwriters might usefully be sought. If we should adopt the French suggestion that persons on and around airports assume the risk of air accidents in those localities, it might be found that the hazard in places other than airports is sufficiently slight to be capable of being handled by means of properly enforced regulations against flying over cities, towns and open air assemblies.

The insurance policy which we adopt may have a decisive effect on the future picture. If the burden is made very heavy, the small taxi services will be driven into larger groups with greater financial strength and a spread of the burden which may be good; and a substantial number of individual aircraft owners may be driven out of the air; solo flying may become a rich man's game. Do we wish this result, or do we wish to encourage young men and women of all shades of financial ability to learn to fly and own aircraft and practice the art on their own hook?

The other side is represented by Mr. Charles P. Hines' article entitled "Home versus Airplane."³⁶ The ceaseless buzzing around of student aviators is to him a tiresome nuisance; the risk of being hurt by the inexpert student is an unpleasant threat. In 1936, 25 schools are licensed by the federal government. The nuisance and the risk are apparently capable of being limited to 25 areas. An area adjustment is apparently possible. In the meantime, decisions in California are challenging Mr. Hines' thesis that flyers have only limited rights. But Mr. Hines' protests may be made very effective by requiring the solo flyer to post a heavy bond or furnish a costly insurance coverage. The national need of plenty of good aviators and the daily need of quiet in the home, the office and the places where we work and play must be balanced. It will not do to slap on a nation-wide law, tolerating all flying everywhere, or banning it everywhere. Let us first try a solution in terms of areas or zones. As the world is moving today, we must have flying, whether we want it or not. We are fortunate in having plenty of areas where students can practice.

It would be wise to wait for a season and see how the new British plan of a heavy insurance, bond or cash deposit works out before jumping to the conclusion that it is the solution best adapted

36. 16 A. B. A. J. 217 (April, 1930).

to any or all of our states. If it works well in England, it might be suitable for our populous Eastern and north central areas; but it seems unlikely that it would ever be suitable for our sparsely populated areas. Of course, the day may come when we have a million airplanes, or twenty million, as we now have twenty-six million motor cars. But that day is certainly not yet at hand. Is it wise to burden the present with a machinery of liability protection to manage a situation which does not exist and which may not come in our generation? I submit that we will do our part if we bend our thoughts to the nearer future, and leave the more distant picture to be dealt with by the experts of that future day.

CONCLUSION AS TO A PRESENT POLICY

(1). *Goods* which are shipped by aircraft require no special favors; the owners of the goods know and willingly take the hazard; it is a hazard which the insurance market of the present day willingly accepts at reasonable premiums. I have heretofore questioned whether the owner of goods shipped by air should escape paying for damages done by the falling of his goods on my house and person. I still think he should pay for such damage.

(2). *Persons* travelling by air require protection against negligent injury; they are entitled to a high degree of care. It is a matter of human relations. On the other hand, they are fully cognizant of the difference between travel by water, by land, and by air. They accept with only murmurs the appalling accident record of the automobile, and are content to settle their rights in motor car cases on the good old negligence basis, in spite of the wisdom of the Ballantine committee's plan of a recovery like workmens' coupensation regardless of fault. As long as we bear with the motor car and motor bus situations, which most of us cannot avoid when bad luck comes our way, the aircraft passenger seems amply protected by a limited but insured recovery, such as the Warsaw Convention rule, whose workings are exhibited by the case of *Grein v. Imperial Airways*. The air transport carriers appear anxious to assume the same liabilities as the railways with which they compete; it remains, however, an open question whether other persons who use the air should be held to such a high standard of liability. It would seem far more appropriate to measure the liabilities of aircraft owners who are not common carriers by the standard of the private motor car owner.

Sir Norman Hill devoted five years to a campaign to put ocean

passenger deaths and injuries on an insurance-compensation basis. Sir Norman is the head of the Liverpool and London Steamship Protection and Indemnity Association, 20 Water Street, Liverpool, and 88 Leadenhall St., London. This is the Mutual Liability Club of which most of the great English passenger lines are members; it includes the Canadian Pacific, Cunard, White Star, Orient, Pacific Steam Navigation, Royal Mail, Union Castle Mail Lines.

Sir Norman's campaign was conducted through the International Maritime Committee, 30 Rue des Escrimeurs, Antwerp, Belgium, and the many documents are found in the Maritime Committee's Bulletins 74 (Genoa 1925), No. 85 (Amsterdam 1927) and No. 91 (Antwerp 1930). The plan finally failed because it was impossible to agree on a single scale of compensation for all ships and all trades. I have never understood why an effort was not made to establish a series of scales for the different trades.

Sir Norman's principal statistical argument was that the experience of his Mutual Liability Club over some fifty years had shown that only 62% of the money went to the killed and injured passengers. 32% went to the expenses of investigation and defense and 6% went to miscellaneous. He argued that he could pay a decent compensation for every death and injury, regardless of negligence, out of the same money which he was using for investigation, defense and settlements. The figures he had in mind were regarded as much too high by the Italians and Spaniards and in the trades to India, China and Japan; and much too low in the Atlantic trades.

I am a firm believer in the insurance principle and think it an immense pity that we have set our faces against it because of sentimental excitement over the *Morro Castle* and the *Vestris*.

(3). *Air collision* is going to be some day a serious problem. As traffic in the lanes reaches the saturation point and secondary lanes have to be established, the free areas will be more and more hemmed in, and a crossing of the traffic lanes from one free area to another will become more and more hazardous. The danger points, however, will be around the airports. Often there will be no witnesses. Often there will be no evidence on which to argue that the loss should be shifted. Will the underwriters of the property values be content to take these losses without seeking to shift them? And will the passengers and crew personnel be content to take their compensation as they would do if there were a simple crash? It seems hopeless to embark on a policy of loss-shifting in air collision cases.

(4). *Damage on the ground.* The theoretical basis of any solution is that the persons and property owners on the ground do not consent to being flown over and crashed upon. Of course, that is not so true of airports—nor perhaps of professional aviators. If we are establishing a preferred position for the non-assenting man on the ground, should we not except that property which is devoted to aviation purposes? For surely its owner assents to aviation.

The practice of burdening aviation with absolute and unlimited liability for the damage it does by trespassing on the ground by dropping something is likely to ruin and wipe out the unlucky aircraft owner whose machine falls, perhaps because of a thunderbolt, or a suicide, or a sportsman's shot. It is a severe deterrent. One deterrent is more severe—the requirement of a large deposit of cash or securities as a prerequisite to flight.

For property damage, it is suggested that the risk should be tacked on to the fire insurance coverage. For death and injury cases, we can turn to the Rome formula—absolute but limited liability covered by a prerequisite deposit of cash or securities or—what amounts to the same thing—a surety bond or an incontestible liability insurance policy. For we all know that such surety bonds and policies can only be had upon suitable pledges of assets. The extent of this deterrent depends on the money figures which are adopted.

There remains the question of how we shall apply this formula by boundaries—shall it be done by cities, or counties, or states, or federally? Shall a transcontinental flight require one cash deposit, or eleven, or twenty?

Clearly the federal government can impose such a system only on interstate commercial flight. Local systems must be imposed by states. However, a nation-wide result can be approximated by interstate reciprocity on the Rome Convention plan; if the standardized insurance requirements are met in one state, it will be lawful to fly in all.³⁷ The American Bar Association is at this moment endorsing the Rules of Civil Practice in the District Courts, which will greatly

37. The legislative right to destroy a common-law remedy, without creating an effective substitute, has been successfully asserted by the New York legislature in respect of certain matrimonial actions. *Fearon v. Treanor*, 272 N. Y. 268 (decided Dec. 31, 1936). See also *supra* note 23. It is uncertain to what extent legislatures can merely destroy common-law forms of actions, whether in terms of rights or remedies; it cannot now be said with assurance that a state legislature can take away the right to sue for aircraft crash damages and substitute a right to resort to a compulsory insurance placed in another state.

facilitate the collection of federal courts judgments all across the country. If Congress will provide that mere diversity of citizenship will support jurisdiction of a suit for damage done by the fall or crash of aircraft property to persons and property on the ground without the requirement of a minimum amount of damage such as the present \$3,000 rule, a workable system may be evolved. If you must have compulsory prerequisite cash, surety or insurance before you can fly, let it be done on a nation-wide basis; else you will effectively clip the wings of aviation and reduce our private flying to the situation of Europe, with each state barred against its neighbor.